RAMAL PROPERTIES SDN. BHD.

v.

EAST WEST-UMI INSURANCE SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[CIVIL SUIT NO: D5-22-25-1996]
22 APRIL 1997

CIVIL PROCEDURE: *Disposal of action without trial - Striking out - Rules of the High Court 1980, O. 18 r. 19 - Res judicata - Adjudication, what constitutes - Conditions for application of doctrine - Estoppel - Whether discontinuance of action constitutes a bar to subsequent action*

CONTRACT: *Building contract - Agreement to contract housing project - Breach - Termination - Performance Bond - Guarantee - Demand for payment - Waiver - Whether supplemental agreement constitutes waiver of breach - Discharge of surety - Contracts Act 1950, s. 87*

The plaintiff was the owner and developer of a housing project ('the project') and had engaged one Gedong Sdn. Bhd. ('Gedong') and one Ingeback (Malaysia) Sdn. Bhd. ('Ingeback') as the turnkey contractor and the sub-contractor respectively for the project. The defendant provided a Performance Bond to the plaintiff and Gedong to guarantee the due performance of the said construction by Ingeback. Based on this Performance Bond, a Building Contract was entered into between Gedong and Ingeback. Gedong also assigned to the plaintiff all its rights to receive from the defendant all monies payable under the Performance Bond.

Ingeback subsequently defaulted in its various obligations under the Building Contract and Gedong terminated the Building Contract. The plaintiff and Gedong then by way of their solicitors' letter made a claim against the defendant on the Performance Bond.

Meanwhile, Gedong had entered into a Supplemental Agreement with Ingeback to grant an extension of time to Ingeback to complete the project. Parties had also agreed to put on hold all outstanding legal issues between them subject to a review at a later date. However, in spite of the extension given, Ingeback was unable to complete the project.

Subsequently, Ingeback applied for and obtained an injunction to restrain the defendant from paying out on the Performance Bond ('the 1025-90 Suit'). The plaintiff intervened for the purposes of dissolving the injunction. However, a procedural objection was raised by the defence and the plaintiff's application

was dismissed with liberty to file afresh. Subsequently Ingeback withdrew the 1025-90 Suit and this was consented to by the plaintiff.

The plaintiff then filed a claim against the defendant based on the Performance Bond. The defendant applied to strike out the plaintiff's claim but this was dismissed by the Senior Assistant Registrar. The present suit was an appeal to the High Court against the decision of the Senior Assistant Registrar.

The defendant contended that the plaintiff's claim should be struck out on the following two grounds; namely:

(a) *res judicata* and estoppel. The defendant submitted that by consenting to the withdrawal of the 1025-90 Suit, the plaintiff had relinquished its claim against the defendant and was therefore estopped from filing the same claim against the defendant by way of the present action; and

(b) that the claim on the guarantee was bad as the Performance Bond had lapsed. The defendant contended that by entering into the Supplemental Agreement, the plaintiff had waived the first breach and hence the demand on the guarantee upon the defendant for the first breach had lapsed and the guarantee had subsequently expired.

Held:

[1] It is trite law that only in plain and obvious cases may recourse be had to the summary process under O. 18 r. 19 of the Rules of the High Court, 1980. The Court would not go into a minute and protracted examination of the documents and the facts of the case in order to see whether the plaintiff had a cause of action. As long as the statement of claim disclosed some cause of action or raise some question fit to be tried, the mere fact that the case would be weak and not likely to succeed would not be a ground for striking out.

[2] On the issue of *res judicata*, the Court held that the discontinuance of an action is no bar to a subsequent action for the same cause of action. The merits of the plaintiff's claim were never considered and decided upon by the Court in the earlier suit and that there was never a final decision made. That the existence of a previous judgment is the very essence of the doctrine of *res judicata.*

[3] An on-demand Performance Bond is only conditional upon the beneficiary asserting the basis of the claim upon the issuer of the Bond contending that there had been a breach of contract. Upon such a demand being made, the liability of the defendant to pay under the Performance Bond would

be immediately attracted without it having to decide on the merits of the dispute. On the facts, the Court held that the solicitor's letter claiming on the Performance Bond was sufficient to constitute such a demand and that the liability of the defendant had already accrued since then. In the letter of demand there was no necessity to request the guarantor to pay within a specified time. Once a demand had been served, the beneficiary should give a reasonable time to the guarantor to meet its obligation.

[4] To determine whether a surety is liable under a contract of suretyship, it is important to distinguish between the rights of a surety under an ordinary contract of suretyship not containing any special provisions and the rights of a surety where the instrument creating the suretyship contains certain special clauses. The effect of s. 87 of the Contracts Act 1950 is rendered nugatory by the use of other clauses designed to preserve the surety's liability despite the release of the principal debtor in contracts of guarantee.

[5] On the facts, the Court found that the plaintiff had not waived the breach by Ingeback as they were not a party to the Supplemental Agreement. Moreover, the terms of the Supplemental Agreement itself showed that there was no waiver of the breach. The Court also held that Gedong, having divested itself beneficially of the right to claim under the Performance Bond, cannot affect the right of the plaintiff to claim under the Performance Bond from the defendant.

Cases referred to:

Asia Commercial Finance v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783 ***(refd)***

Esso Petroleum Malaysia Inc. v. Kago Petroleum Sdn. Bhd. [1995] 1 CLJ 283 ***(refd)***

IE Contractors Ltd. v. Lloyds Bank plc and Rafidain Bank [1991] 51 Build LR 1 ***(refd)***

Esal (Commodities) Ltd. v. Oriental Credit Ltd. [1985] 2 Lloyd's Law Reports 546 ***(refd)***

Teknik Cekap Sdn. Bhd. v. Public Bank Bhd. [1995] 4 CLJ 697 ***(refd)***

United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd. & 3 Ors. [1987] 1 CLJ 501 ***(refd)***

Cowper v. Smith [1838] 150 All ER 1534 ***(refd)***

The Union Bank of Manchester v. Beech [1865] 159 All ER 695 ***(refd)***

Perry v. National Provincial Bank of England [1910] 1 Ch. 464 ***(foll)***

Commercial Bank of Tasmania v. Jones [1893] AC 313 ***(refd)***

Bank of Adelaide v. Lorden [1971-2] 127 CLR 185 ***(refd)***

United Malayan Banking Corporation v. Datin Theresah [1995] 1 AMR 304 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 87

Other sources referred to:
Calls on Performance Bonds in Malaysia – The Current Law, [1992] 2 MLJ i
Supreme Court Practice (Malaysian Edn.) 1996 Reprint, Vol. 1, para. 21/2-5/13
Annoted Statutes of Malaysia – Contracts Act 1956

For the respondent - E.S. Chuah (M.Y. Goh with him); M/s. Iza ng Yeoh & Kit
For the appellant - Renu Zechariah; M/s. Anad & Noraini

JUDGMENT

RK Nathan JC:

The defendant filed an application to strike out the plaintiff's claim by way of Encl. 5. The learned Senior Assistant Registrar (SAR) dismissed the said application; hence this appeal before me.

Background Facts

The plaintiff is the owner and developer of 3 middle-cost apartment blocks at Lot PT4, Jalan Berhala, Section 72, Wilayah Persekutuan (the project). Pembinaan Gedong Sdn. Bhd. (Gedong) was engaged as turnkey contractor and Ingeback (Malaysia) Sdn. Bhd. (Ingeback) was engaged as the sub-contractor for the project. The defendant entered into a Performance Bond on 14 December 1987 with the plaintiff and Gedong to guarantee the due performance of the said construction by Ingeback for the sum of RM29,849,443 (the Performance Bond). Based on this, Gedong entered into a Building Contract with Ingeback on 24 March 1988 for the construction of the project. Meanwhile, Gedong entered into a Deed of Assignment with the plaintiff on 28 June 1988 whereby Gedong absolutely assigned its rights to receive from the defendant, all monies payable under the Performance Bond. Ingeback however breached the provisions of the Building Contract and defaulted in its various obligations, the details of which need not be enumerated for the purposes of this appeal. Gedong therefore terminated the Building Contract by way of its letter dated 19 April 1990 (the first breach). The plaintiff and Gedong then by way of their solicitors' letter dated 23 April 1990 made a claim against the defendant on the Performance Bond.

On or around July 1990 Ingeback as plaintiff made an application through a writ of summons D5-22-1025-90 (1025-90 suit) to *inter alia* obtain an injunction to restrain the defendant from paying out on the Performance Bond without naming the plaintiff or Gedong as co-defendants. Such an order was granted on 6 July 1990. The plaintiff intervened in the 1025-90 suit for the purposes of dissolving the injunction and for claiming on the guarantee issued by the defendant. However procedural objections to the said application to dissolve the injunction were taken by the defence and the said application was

dismissed with liberty to refile. There was no further application. Subsequently the 1025-90 suit was called up by this Court on a show cause notice and Ingeback through the Official Receiver withdrew the said suit with the implied consent of the present plaintiff and Gedong (the intervenor).

In any event even before this order was granted Gedong and Ingeback had agreed by way of a letter dated 26 June 1990 (Exh. WT0-5 to Encl. 6) that both parties had expressed the wish to complete the project and with this in mind Gedong had granted Ingeback an extension of time to complete the project. It was also agreed by the parties that:

> On the current position of insurance guarantee, termination letter and whatever legal actions both parties are considering taking should be put on hold and be reviewed by both parties at a later date.

To further cement their desire to complete the Project, Gedong entered into an agreement dated 10 August 1990 with Ingeback (Supplemental Agreement) which agreement was supplemental to the Building Contract whereby *inter alia* Ingeback was allowed to recommence work in the project as sub-contractors. In spite of extensions given, Ingeback was unable to complete the project and sought help from Gedong by way of its letter dated 12 June 1991 (Exh. WTO-6 to Encl. 6) to take over the management of the project up to completion. Accordingly Ingeback ceased all further involvement in the project.

However, their aforesaid breaches of contract had already caused a delay of more than one year to the project, thus incurring liability to Gedong as liquidated and ascertained damages under the Building Contract and Supplemental Agreement amounting to RM4,087,532.90 as averred in Encl. 6. This has not been denied by Renu Zechariah who affirmed an affidavit on behalf of the defendant, in response to Encl. 6.

What Must Be Satisfied In An Application To Strike Out Pleadings

It is trite law that only in plain and obvious cases may recourse be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980 (the RHC). This Court will not go into a minute and protracted examination of the documents and the facts of the case in order to see whether the plaintiff has a cause of action. As long as the statement of claim discloses some cause of action or raise some question fit to be tried, the mere fact that the case is weak and not likely to succeed is no ground for striking out.

This application to strike out the plaintiff's claim is launched on two grounds, namely, (a) *res judicata* and estoppel, and (b) that the claim on the guarantee is bad as the guarantee had lapsed.

On the issue of estoppel the defence submits that by consenting to the withdrawal of the 1025-90 suit which action is based on the same claim as the present suit, the plaintiff has relinquished its claim against the defendant and is therefore estopped from filing the same claim against the defendant by way of this present action.

The defendant contends that by entering into the Supplemental Agreement the plaintiff had waived the first breach. Therefore having waived the first breach and having reinstated Ingeback as the contractor the demand on the guarantee for the first breach upon the defendant had lapsed. Since no further claim was made on the guarantee the guarantee expired on 31 May 1990. It is obvious from the facts that Ingeback had defaulted again in their obligations under the Supplemental Agreement thereby committing a second breach. The defendant argues that if *res judicata* and estoppel do not apply then the claim on the guarantee itself is bad as the guarantee had lapsed due to the plaintiff and Gedong waiving the breach by Ingeback and due to the guarantee expiring on 31 May 1990.

With regard to the plea of *res judicata* the defendant relied on *Asia Commercial Finance v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 wherein the Federal Court held that the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action but was not, whether deliberately or inadvertently.

What Is A Performance Bond

Our appellate Courts have had occasion over the past year to plumb the nature of such bonds over a series of decisions beginning with the Federal Court decision in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn. Bhd.* [1995] 1 AMR 189; [1995] 1 CLJ 283, where Peh Swee Chin FCJ said at p. 199:

> It is obvious that the word "bond" is a loose, general term, used also to include a group of documents or legal instruments such as a contract of guarantee, or of indemnity or an undertaking to pay. Any attributive word before the word "bond" usually refers to the purpose of the bond such as tender bonds, performance bonds etc. Performance bonds are almost invariably contracts of guarantee and so named presumably to give that extra air of solemnity.

In the present case the defendant agreed to guarantee the due performance of the Building Contract. To my mind this guarantee was indeed a performance bond as defined in *Esso Petroleum*. In the course of their judgment the Federal Court referred to and approved of an article by Vincent-Powell-Smith entitled *"Calls on Performance Bonds in Malaysia – The Current Law"* [1992] 2 MLJ i. In the said article the learned author referred to the recent English Court of Appeal decision in *IE Contractors Ltd. v. Lloyds Bank plc and Rafidain*

Bank [1991] 51 Build LR 1 which held that a performance bond, like a letter of credit, will generally be found to be conditioned upon the presentation of one or more documents, and will not be conditioned upon the existence of facts which those documents assert. It further held that if that was the case, the bank must pay when the call was made unless there was established an obvious fraud.

The English Court of Appeal in the case of *Esal (Commodities) Ltd. v. Oriental Credit Ltd.* [1985] 2 Lloyd's Law Reports 546 tackled this issue in the context of an undertaking in a performance bond which was as follows:

> We undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance ...

After summarising the arguments of Counsel for the defendant, Lord Ackner LJ rejected an interpretation of the said undertaking which required the bank which issued the performance bond to take upon itself the obligation of deciding the merits of the dispute as it was a function for which the bank was wholly unfitted and which the parties could not sensibly have intended. He went on to say that the absurdity of such an interpretation was clear in that:

> ... if the performance bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a competent Court of jurisdiction and this result would be wholly inconsistent with the entire object of the transaction, namely to enable the beneficiary to obtain prompt and certain payment.

As such, the Court found that the bank was not concerned in the least with the relation between the supplier and customer nor with the question whether the supplier was in default or not; the only exception being where there was clear evidence both of fraud and of the bank's knowledge of that fraud. Lord Ackner further held that in making the demand, the beneficiary only needed to inform the bank that he did so on the basis provided for in the performance bond itself.

Esal (Commodities) was followed and directly applied in *Teknik Cekap Sdn. Bhd. v. Public Bank Bhd.* [1995] 4 CLJ 697 wherein our Court of Appeal decided that the wording of the performance bond considered therein required the beneficiary to assert in substance, without the need to use the exact words as found in the performance bond that there was a breach of contract. The bond in *Teknik Cekap* was as follows:

> If the Sub-Contractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder, then the Guarantor shall pay ...

Clause 2(i) of the Performance Bond in the instant case reads:

> if the Contractor ... shall in any respect fail to execute the Contract or commit any breach of his obligations thereunder, then the Guarantor will indemnify and pay the Principal ...

The said cl. 2(1) is virtually identical to the one used in *Teknik Cekap* and is similar to the one used in *Esal (Commodities)*. As such I hold that cl. 2(1) of the instant case renders the Performance Bond an on-demand Performance Bond which is only conditional upon the beneficiary asserting the basis of the claim upon the issuer of the Bond contending that there has been a breach of contract. I further find that upon such a demand being made, the liability of the defendant to pay under the Performance Bond is immediately attracted. I therefore reject the defendant's contention that the said letter only constitutes a mere notification and not a demand. In fact referring to the *Esso Petroleum (supra)* Peh Swee Chin FCJ said at p. 201:

> ... There was nothing there that could suggest that the demand was not proper, and for complying with the simple words there of making a claim by "a demand in writing", the said letter was sufficiently compliant even though it was verbose.

The usage of the words "notice of demand" in that letter was thus held not to derogate from the acceptability of the relevant letter as a demand. His Lordship also went on to adopt the principle that strict compliance was not necessary in the case of the demands on performance bonds. The liberality of their approach was illustrated when the Court of Appeal said at p. 201:

> If words are in apparent conformity with the wording in any particular bond, they are sufficient.

Although the bond in *Esso Petroleum* was a pure on-demand bond, that difference is not material to this case because the only interpretative difference between a pure on-demand bond and a bond conditional only upon the assertion of a given state of facts, lies only in the need to make the said assertion. The test as to whether the letter dated 23 April 1990 is a good demand is the same no matter whether the bond is a pure on-demand or any other kind of performance bond.

As for the defendant's assertion that the guarantor must be given a reasonable time to meet the obligations, it is my finding that the defendant could have paid the monies so demanded by the letter dated 23 April 1990, at any time

after that and up till 6 July 1990 when the injunction to stop the defendant from paying out on the Performance Bond was granted to Ingeback. The defendant had more than two months to make payment but it did not do so.

It was also argued by the defendant that a letter of demand must *inter alia* also request the guarantor to pay within a specified time. It is my judgment that there is no necessity to request the guarantor in the letter of demand to pay within a specified time. Once a demand has been served the beneficiary should give a reasonable time to the guarantor to meet the obligation. In fact even the letter of demand in the *Esso Petroleum* does not contain such a stipulation and the Federal Court found that letter of demand sufficient. The defendant's reliance on *United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd. & 3 Ors.* [1987] 1 CLJ 501 to support the argument that the letter ought to tell what the demand was about and what amount of payment the other defendants had to make, is totally flawed. I find as a fact that in the letter dated 23 April 1990 the plaintiff had in fact referred to the Performance Bond dated 14 December 1987 between the two parties and had explained that the defendant had agreed to guarantee the due performance of the contract by Ingeback, about the breach of Ingeback of the contract, and of the consequential termination. In fact a copy of the letter of termination was even served on the defendant together with the said letter of demand. Further the amount of the claim was specifically mentioned in the said letter. The case of *United Prime* can be distinguished from this case as it rests upon facts which are vastly different from the facts of the instant case. The plaintiff in that case did not serve any letter of demand on the defendants who were guarantors for United Prime Corporation for their obligation under an equipment lease agreement but merely sent a carbon copy of the letter of demand to United Prime Corporation.

Was The Guarantee In Respect Of The First Agreement Or The Supplemental Agreement

The defendant raised the question as to whether the guarantee was in respect of the first agreement between the plaintiff and Gedong and Ingeback or whether it guaranteed the due performance of the Supplemental Agreement and submitted that the guarantee was for the due performance of the first agreement and not the Supplemental Agreement. The plaintiff in its submission took umbrage to the contention that there are two separate agreements. The Supplemental Agreement, said the plaintiff, was meant to supplement the terms of the Building Contract.

As can be seen from the statement of claim the plaintiff is claiming from the defendant under the performance contract by way of its letter dated 23 April 1990 because of the breach by Ingeback, of the terms of the Building Contract

which resulted in the termination of the Contract by way of the letter dated 19 April 1990. The defendant has alleged that the breaches of the terms by Ingeback were waived by the plaintiff when the Supplemental Agreement was signed.

Was There A Waiver

It must be borne in mind that the Performance Bond itself provides that the defendant is not discharged/released from the Bond by the reinstatement of Ingeback as the sub-contractor for the project. The exact words of cl. 2(ii) *inter alia*, reads:

> ii) The Guarantor shall not be discharged or released from this Guarantee by any arrangement between the Contractor and the Principal with or without the consent of the Guarantor or by any alteration in the obligations undertaken by the Contractor or by any forbearance whether as to payment, time, performance or otherwise, but the Guarantor shall be entitled to be informed of such arrangement or alterations.

Clearly the word "arrangement" in cl. 2(ii) of the Bond must mean a discharge of the liabilities of a debtor to his creditor by some partial performance of the original contract. The Supplemental Agreement provides that Ingeback may resume work on the project with new completion dates and it was also agreed that the block of low-cost apartments be excluded from the scope of the building agreement. I shall deal with the issue of waiver later. But even assuming for a moment that the Supplemental Agreement was a waiver of the earlier breaches by Ingeback, it would seem that Gedong and Ingeback have now entered into an arrangement whereby the previous breaches by Ingeback to Gedong are thereby discharged in return for partial performance of the Building Contract according to the new terms as promulgated by the Supplemental Agreement. Therefore even if the Supplemental Agreement constitutes a waiver of Ingeback's breaches, by Gedong, cl. 2(ii) of the Performance Bond provides that although Ingeback may be so discharged from its liability, the defendant's liability for the aforesaid breaches as a result of the demand letter dated 23 April 1990 still remains and the defendant has thus far failed to pay up. In any event the contract was not performed by Ingeback, as it turned out. It is perfectly possible for a surety to enter into a contract with a creditor in the guarantee document that notwithstanding any composition, release, forbearance or arrangement, the surety shall remain liable although the principal does not. The train of authorities supporting this proposition began with the decision of the English Court of Exchequer in *Cowper v. Smith* [1838] 150 All ER 1534. Here the defendant entered into a guarantee with the plaintiff for goods to be supplied by the plaintiff to a person named Green. The guarantee provided *inter alia* that the plaintiff could grant

to Green and the persons liable upon such bills, notes or securities, any indulgence, and to compound with him or them respectively, as the plaintiff might think fit, without the same discharging or in any manner affecting the liability of the defendant, by virtue of the guarantee. The plaintiff later became parties to a deed of composition with Green and its creditors wherein Green assigned all his stock in trade to his creditors and in consideration thereof, the plaintiff released Green from all his debts to him. It was the decision of the Court that as the surety had expressly contracted to remain liable, notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal was an implied discharge of the surety. *Cow* per was followed and applied in *The Union Bank of Manchester v. Beech* [1865] 159 All ER 695 where the surety guaranteed the payment of a bank account and agreed, *inter alia* that no composition with the principal debtor would discharge the liability of the surety notwithstanding any objection or protest by the surety against the making of such an arrangement. Subsequently, the principal debtor entered into a deed of arrangement for the benefit of his creditors, whereby he assigned to them all his property to apply for the benefit of the creditors in like manner as if he had been adjudged a bankrupt. The Court held that such an arrangement was an absolute release, that there was substantially no difference between a composition and a release and applied *Cow* per in deciding that the surety had expressly agreed in the guarantee that a composition would not discharge him from liability to the plaintiff.

The English Court of Appeal had affirmed the aforesaid authorities in the case of *Perry v. National Provincial Bank of England* [1910] 1 Ch. 464. In that case the terms of the mortgage deeds entered into by the plaintiff surety for the benefit of the bank as security for moneys owing to the bank by the principal debtor provided that:

> ... the bank shall be at liberty without **thereby affecting their rights herein** at any time to determine or vary any credit to the debtors or any of them to vary exchange or release any other securities ... and to compound with, give time for payment of, and accept compositions from and make any other arrangements with the debtors ... (emphasis provided)

The principal debtor ran into serious financial problems and entered into an arrangement whereby all of the completed properties of the said debtor would be acquired by a newly formed company which would issue debenture stock to creditors in full satisfaction of the debts of the debtor. The shares of the company would only be issued to the debtor upon the full payment of the debentures. Accordingly the bank entered into the arrangement and was allotted debenture stock. However, the company was unsuccessful in paying the interest on the debenture stock and the bank threatened to sell the properties which had earlier been mortgaged to them by the surety. The debtor sued for a

declaration that nothing was due on the mortgages on the basis that the liability of the surety under the mortgages had been discharged by the release of the principal debtor.

Lord Cozens-Hardy MR said at pa. 471:

> ... It is important to distinguish clearly between the rights of a surety under an ordinary contract of suretyship not containing any special provisions and the rights of a surety where the instrument creating the suretyship contains certain special clauses. It is elementary law that in a simple case of principal and surety the surety is discharged if the creditor gives time to the principal or does certain other acts; and, a *fortiori*, if the creditor releases the principal debtor, of course the surety is released too. There are a certain number of acts which will not release the surety if, when the act in question is done, there is a reservation of rights against the surety. A common instance of this is giving time. When you find in the instrument of suretyship itself a provision that the surety shall be liable notwithstanding certain acts being done by the creditor which would otherwise release him, these doctrines have no application at all. It is not then a simple contract of suretyship. It is true that in one sense it is a contract of suretyship, but it is a contract of suretyship containing special clauses which deliberately exclude certain rights which the surety would otherwise have had.

The Master of the Rolls went on to apply the decisions in *Cowper* and *Union Bank* and held as follows at p. 475:

> ... The surety had himself contracted that the rights under the deed should not be affected by any such arrangement; and, that being so, it seems to me that though there is no personal liability on the part of Perry Brothers to the bank, yet as regards this 1630l. this is part of the liability of Perry Brothers secured by the mortgage and is within the meaning of the deed something for which the surety is still liable to the bank notwithstanding the release of the debtor.

In the *Commercial Bank of Tasmania v. Jones* [1893] AC 313 the Privy Council gave a decision which ran counter to the views of the Master of the Rolls in *Perry*. The facts of the case were that B had guaranteed the debts of W for the benefit of the bank. The guarantee provided that the appellants might at any time compound with W for the whole or any part of his or their liabilities to the appellants and that no such composition, granting of time, taking of security, release, discharge, or arrangement, should have the effect of releasing or in any wise affecting B's liability under the guarantee. W in the meantime had conveyed to the bank property as security. In 1889 W owed the bank £2400 and entered into an agreement with M to convey to him the properties subject to the mortgage. The bank accordingly agreed that W's liability to the bank should be transferred to M, and that the properties be reconveyed by the bank back to W so that W could convey the properties to

M who would then mortgage them to the bank for the amount due. The bank agreed to accept M as debtor instead of W. B died before he could give a guarantee to the bank in respect of M. The Court held that where there is an absolute release of the principal debtor, the remedy against the surety B is gone and where such release is given no right can be reserved because the debt is satisfied and completely novated. To my mind the facts of the *Commercial Bank of Tasmania* differ markedly from the facts of the instant case. The creditor in that case accepted a third party in the place of the debtor and as such constituted a complete novation of the debt. There is nothing of that sort in the case before me.

In any event the decision in the *Commercial Bank of Tasmania* was not followed by the Court of Appeal in *Perry*. Fletcher-Moulton LJ, in strongly disapproving of that decision, said at p. 476:

> ... I confess I do not quite understand the language that is used. If it means that in an ordinary contract of pure suretyship the consequences enumerated follow, it is only a statement of obvious and uncontested law, and this accounts for the learned Lord speaking of it as being settled law. If the meaning is that it is impossible to make a legal contract which would have certain legal effects we cannot accept such law. It would be in conflict with the law laid down by the Court of Exchequer in the two cases to which the Master of the Rolls has referred and which were not cited in the case before the Privy Council. Moreover it would be quite meaningless. People can contract to do anything. All that it would amount to would be that if it was a contract which had those legal consequences it could not properly be called a contract of suretyship.

Accordingly Fletcher-Moulton LJ restricted *Commercial Bank of Tasmania* (a decision which was not binding on the Court of Appeal and also not binding on me) to its facts and to the "normal contract of suretyship" and interpreted the decision as instead as resulting from the failure of Counsel on behalf of the bank in *Commercial Bank of Tasmania* to convince the Privy Council that the case fell within the special clauses of their contract.

In the case before me it is my judgment that the liability of the defendant had already accrued since 23 April 1990 when the letter of demand was issued and the breach was in the end not remedied by the defendant, notwithstanding the Supplemental Agreement.

The decision in Perry was subsequently followed by the High Court of Australia being the highest appellate Court in the case of *Bank of Adelaide v. Lorden* [1971-2] 127 CLR 185. The terms of the guarantee instrument in the Bank of Australia were similar to that of the case before me. Barwick CJ held that the surety might agree in advance to remain liable though the debt of the principal debtor be discharged by other means than payment as, for

example, by composition. The learned Chief Justice went on to apply the decision in Perry to the facts of the case before him and held that the liability of the surety remained though the debt of the principal debtor has been discharged otherwise than by payment in full. There is no doubt that the position is the same in Malaysia. It is my finding that a release of the principal debtor by the creditor will not discharge the surety if he has expressly agreed to remain liable, so that there is then no ground for the presumption that he is impliedly discharged. Notwithstanding the fact that s. 87 of the Contracts Act 1950 states that a surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor, yet in practice the effect of this section is rendered nugatory by the use of other clauses designed to preserve the surety's liability despite the release of the principal debtor in contracts of guarantee (see p. 142 of the *Annotated Statutes of Malaysia – Contracts Act 1956*).

In the circumstances, it is my judgment that the decision in Perry is sound law and I therefore adopt the ruling therein. As a result the entry of Ingeback and Gedong into the Supplemental Agreement does not constitute a waiver which would entitle the defendant to escape liability under the Performance Bond.

Supplemental Agreement Is Not a Waiver Of Ingeback's Breach Of Contract

It is my finding that the plaintiff has not by way of the Supplemental Agreement waived the breach by Ingeback. The Supplemental Agreement is between Ingeback and Gedong. The plaintiff is not a party to the Supplemental Agreement. Gedong had, on 28 June 1988, that is, long before the date of the execution of the Supplemental Agreement which was on 10 August 1990, assigned its rights under the Performance Bond to the plaintiff. The said assignment had been consented to expressly by the defendant on 4 July 1988 (Encl. 6 Exh. WTO-4). It is therefore not true to contend that the plaintiff entered into the Supplemental Agreement. As such the terms thereof should not bind the plaintiff and having divested itself beneficially of the right to claim under the Performance Bond, Gedong's acts cannot possibly affect the right of the plaintiff to claim under the Performance Bond from the defendant. In addition, the terms of the Supplemental Agreement itself show that there is no waiver of the breach. Clause 2 of the said Agreement provides that there has been a dispute between the parties and that the parties intend to resolve such dispute by entering into the said Supplemental Agreement. The terms do not expressly state that the breach by Ingeback has been waived by Gedong at all. In any event, the Supplemental Agreement was not a waiver of Ingeback's breach by whatever party. The parties had agreed to withhold legal action until the completion of the project for the sake of the project, and any legal action could be resumed after the completion of the project.

Res Judicata/Estoppel, Not Applicable

The defendant argued that the doctrine of *res judicata* in its wider sense ought to have been applied in this case and that it was an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. See *Asia Commercial Finance (supra).* In the present case the plaintiff and Gedong had intervened successfully in the 1025-90 suit and were ready to proceed with the application for dissolution of the injunction and for an order that the injuncted money be paid out to them. However, the defendant raised a procedural objection in the 1925-90 suit in that before the plaintiff and Gedong proceeded to dissolve the injunction obtained by Ingeback against the defendant, the plaintiff and Gedong must first file a cause of action against the defendant in the 1025-90 suit and that the defendant be allowed to file a defence to that cause of action. It was a fact that the plaintiff had not filed a claim against the defendant in the 1025-90 suit. When Counsel for the Official Receiver acting for Ingeback withdrew the 1025-90 suit the defendant herein contends that the present plaintiff consented to the withdrawal whereas the plaintiff contends that it merely made no objections to the said request to withdraw the suit. On this basis, the defendant argues that *res judicata* has set in and therefore the plaintiff is estopped from filing this suit.

It must be noted that the only reason why the plaintiff applied to intervene in the 1025-90 suit in the first place was because the injunction obtained by Ingeback in the absence of the plaintiff and Gedong, in effect prohibited the plaintiff and Gedong from proceeding against the defendant to claim under the Performance Bond unless and until the said injunction was set aside.

In any event, even if the plaintiff had consented to the Official Receiver withdrawing the earlier suit and I find that this is indeed so, the *Supreme Court Practice (Malaysian Edn.)* 1996 Reprint Vol. 1 at para. 21/2-5/13 states:

> The discontinuance of an action or the withdrawal of part of a claim without leave is no bar to a subsequent action for the same cause of action (*The Kronprinz* [1887], 12 App. Cas. 256, 262, where the distinction between discontinuance and dismissal is pointed out at p. 259). The effect is the same where the discontinuance is with leave, unless the order giving the leave expressly prohibits the commencement of a fresh action (*ibid.*, at p. 262).
>
> The plaintiff may therefore commence a new action for the same cause, to which such discontinuance will be no defence; but unless he does so in good time, his laches may be a bar (*Reid v. London & N. Staffs. Insce. Co.,* 49 LT 468).

The plaintiff herein filed this present suit five days after the withdrawal of the 1025-90 suit. As such laches is not an issue. Further this Court did not prohibit the plaintiff from filing afresh. Further, I am guided by the decision of my learned brother, Low Hop Bing, JC (as he then was) in *United Malayan Banking Corporation v. Datin Theresah* [1995] 1 AMR 304, 310 wherein he held that a plaintiff is able to elect to proceed with a new legal suit and to instead not proceed or to abandon the previous suit.

In any case it is crystal clear that the merits of the plaintiff's claim were never considered and decided upon by the Court in the earlier suit and that there was never a final decision in respect of the merits of the plaintiff's case against the defendant. In fact the very case relied on by the defendant, namely, *Asia Commercial (supra)* affirms this point. The Court in that case defined the doctrine of *res judicata* as "a matter adjudged" and the rationale of the doctrine is that it creates an estoppel *per rem judicatum*. In other words, when "a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata,* because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth (per Peh Swee Chin FCJ, p. 197).

It is evident therefore that the existence of a previous judgment is the very essence, and *sine qua non* of the doctrine of *res judicata*. Without a previous judgment on the merits of the cause of action or issue, there is simply no *res judicata,* for *"res"* simply means "a thing" and *"judicata"* means "adjudicated". Having held that *res judicata* cannot apply to the instant case it follows therefore that the plea of estoppel must perforce equally fail.

In all the circumstances and having considered every issue raised by the appellant, I dismissed the appeal with costs.

Reported by Ling Hea Hoon